

Admin.

October 2, 1997

Memorandum 97-64**1997-1998 Annual Report: Draft for Approval**

Attached to this memorandum is a draft of the Commission's 1997-1998 *Annual Report*. If approved, the staff plans to send it to the printer in November, subject to any necessary technical revisions to reflect action on Commission bills. Unless the Commission decides to review the Annual Report again at the November meeting, this will be the only time it is reviewed before publication.

In order to save copying costs, we have not included all the appendices that will be printed with the Annual Report. These items are listed in the table of contents on page 6 of the draft Annual Report. A complete copy will be available at the upcoming meeting for your examination. If any Commissioner wishes to examine any of the omitted appendices, let the staff know and we will provide a copy to you.

The revised and supplemental Comments in the report on quasi-public entity hearings (SB 68, 1997 Cal. Stat. ch. 220) in Appendix 4 have previously been approved by the Commission.

The Comments relating to mediation confidentiality (AB 939, awaiting Governor's signature) in Appendix 5 have been extensively revised to conform with amendments made to the bill. Due to the large number of amendments made in AB 939, the final text of the bill is set out in Appendix 5 along with the revised Comments. These Comments should be reviewed and given the Commission's final approval so that we can send them to the law publishers when the bill is chaptered.

The Comments relating to a technical amendment of two versions of Government Code Section 68616 (SB 73, awaiting Governor's signature) in Appendix 6 have been approved in a previous incarnation in the Commission's recommendation on *Tolling Statutes of Limitations When Defendant Is Out of State*. (The main substantive provisions of this recommendation were removed from proposed legislation last year; the Commission has decided to continue to work on a solution to the problem.) The Comments in Appendix 6 are the first

sentences of the earlier versions, with the deletion of cross-references to provisions that were not enacted.

Much of the Annual Report language is the same or similar to past reports, but particular attention should be paid to the revised and new material concerning the 1998 Legislative Program (pp. 10-11), Major Studies in Progress (pp. 11-13), and Commission Budget (p. 21).

There is a place reserved for mention of any activities by Commissioners related to the Commission's work, such as any speeches you have given or articles published since the last Annual Report. (See p. 23.) If any Commissioner has something of this nature that he or she wishes to be noted in the Annual Report, please give it to the staff for inclusion.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

STAFF DRAFT

1997-1998 Annual Report

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Cite this pamphlet as *1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports ____ (1997). This is publication #196.

SUMMARY OF WORK OF COMMISSION

Recommendations Enacted in the 1997 Legislative Session

In 1997, four bills effectuating the Commission's recommendations were enacted relating to the following subjects:

- Mediation confidentiality [awaiting Governor's signature]
- Quasi-public entity hearings
- Attachment by undersecured creditors
- Trial court delay reduction rules (technical amendment) [awaiting Governor's signature]

Five bills introduced in 1997 remain before the Legislature as two-year bills. A recommendation relating to unfair competition litigation was not enacted.

The Commission also submitted a report to the Legislature on its consultation with the Public Utilities Commission concerning needed revisions of the Public Utilities Code resulting from restructuring of the electrical, gas, transportation, and telecommunications industries.

Recommendations to the 1998 Legislature

In 1998, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Trial court unification
- Business judgment rule
- Protecting settlement negotiations
- Interpretive guidelines
- Inheritance from or through a foster parent or stepparent
- Severance of joint tenancy by dissolution of marriage

The Commission will also continue its efforts on the two-year bills introduced in 1997 to implement the following recommendations:

- Judicial review of agency action (SB 209 & SB 261)
- Best evidence rule (SB 177)
- Real property covenants (AB 707)
- Administrative law judge code of ethics (SB 453)

Commission Activities Planned for 1998

During 1998, the Commission will work on trial court unification, health care decisionmaking, administrative rulemaking, environmental law consolidation, the Uniform Unincorporated Non-profit Association Act, and termination of beneficiary designations on dissolution of marriage. The Commission will consider other subjects as time permits, including protective proceedings for federal benefits, local agency hearing procedures, time for responding to a discovery request for production of documents, tolling statute of limitation when a defendant is out of state, mechanical and other problems in the homestead exemption, and issues in eminent domain law and inverse condemnation.

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Bill 73) (trial court delay reduction deadlines)

COMMISSION PUBLICATIONS

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION4000 MIDDLEFIELD ROAD, ROOM D-1
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SANFORD M. SKAGGS
COLIN W. WIED

November 13, 1997

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission herewith submits this report of its activities during 1997.

Three of the nine bills introduced in 1997 to effectuate the Commission's recommendations were enacted. (Five of these bills are two-year bills and will be considered in 1998.) A concurrent resolution recommended by the Commission was adopted.

The Commission also submitted a report to the Legislature on its consultation with the Public Utilities Commission concerning needed revisions of the Public Utilities Code resulting from restructuring of the electrical, gas, transportation, and telecommunications industries

The Commission is grateful to the members of the Legislature who carried Commission-recommended bills:

- Senator Kopp (best evidence rule, judicial review of agency action, quasi-public entity hearings, unfair competition litigation, trial court delay reduction rules, concurrent resolution continuing Commission's authority)
- Senator Calderon (administrative law judge code of ethics)
- Senator Solis (administrative law judge code of ethics)

- Assembly Member Ackerman (attachment by undersecured creditors, mediation confidentiality, real property covenants)
- Assembly Member Ortiz (mediation confidentiality)

The Commission held one two-day meeting and nine one-day meetings during 1997. Meetings were held in Los Angeles, Sacramento, and San Diego.

Respectfully submitted,

Christine W.S. Byrd
Chairperson

1997-1998 ANNUAL REPORT

Introduction

The California Law Revision Commission was created in 1953 as the permanent successor to the Code Commission and given responsibility for a continuing substantive review of California statutory and decisional law.¹ The Commission studies the law to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission assists the Legislature in keeping the law up to date by:

- Intensively studying complex and sometimes controversial subjects
- Identifying major policy questions for legislative attention
- Gathering the views of interested persons and organizations
- Drafting recommended legislation for legislative consideration

The Commission's efforts enable the Legislature to focus on significant policy questions in a recommendation rather than on the technical issues which can be resolved in the process of preparing background studies, working out intricate legal problems, and drafting implementing legislation. The Commission thus helps the Legislature accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time. In some cases, the Commission's report demonstrates that no new legislation on a particular topic is needed, thus relieving the Legislature of the need to study the topic.

The Commission consists of:

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

1. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also *1955 Report* [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

The Commission may study only topics that the Legislature has authorized. The Commission now has a calendar of 21 topics.²

Commission recommendations have resulted in the enactment of legislation affecting 18,793 sections of the California statutes: 8,817 sections added, 3,129 sections amended, and 6,847 sections repealed. The Commission has submitted more than 300 recommendations to the Legislature. About 95% of these recommendations have been enacted in whole or in substantial part.³

The Commission's recommendations are published in softcover and later collected in hardcover volumes. A list of past publications and information on obtaining copies are at the end of this Annual Report.

1998 Legislative Program

In 1998, the Commission plans to submit recommendations to the Legislature concerning the following subjects:

Administrative Law

Interpretive guidelines. The Commission will recommend amendment of the rulemaking provisions of the Administrative Procedure Act to enable an agency to adopt nonbinding interpretive guidelines by means of an abbreviated rulemaking procedure.

Business Law

Business judgment rule. The Commission will recommend codification of the business judgment rule for liability of directors of business corporations.

Civil Procedure and Judicial Administration

Protecting settlement negotiations. The Commission will recommend protecting offers of compromise and other settlement overtures from admissibility and, in some circumstances, from discovery.

2. See list of topics under "Calendar of Topics Authorized for Study" in Appendix 2 *infra*.

3. See "Legislative Action on Commission Recommendations" in Appendix 3 *infra*.

Trial court unification. The Commission will recommend amendments to accommodate trial court unification under Senate Constitutional Amendment 4 (on June 1998 ballot), providing for unification of the trial courts in a county on a vote of a majority of the judges of superior and municipal courts in the county.⁴ The recommendation will also include conforming revisions for the 1994 elimination of the justice court.

Estate Planning, Probate, and Trusts

Inheritance by foster child or stepchild. The Commission will recommend clarification of the law governing inheritance by a foster child or stepchild under Probate Code Section 6454.

Property

Severance of joint tenancy by dissolution of marriage. The Commission will recommend that dissolution of marriage severs a joint tenancy between the former spouses.

Major Studies in Progress

During 1998, the Commission plans to work on five major topics: administrative rulemaking, health care decisionmaking, environmental law consolidation, the Uniform Unincorporated Non-profit Association Act, and selected issues in eminent domain and inverse condemnation. The Commission will also consider other subjects to the extent time permits.

Administrative Rulemaking

Administrative rulemaking is the third phase of the Commission's study of administrative law and procedure, following revision of state agency adjudication and judicial review of agency action. This phase of the study was activated in 1996. The Commission plans to address individual problems in the rulemaking procedure; it will not propose a comprehensive revision of the rulemaking procedure. The Commission will recommend legislation on one aspect of this study in 1998 — interpretive guidelines. The Commission has engaged the services of two expert academic

4. 1996 Cal. Stat. res. ch. 36 (SCA 4).

consultants to give advice on this project: Professors Michael Asimow (UCLA Law School) and Gregory Ogden (Pepperdine Law School). A third academic consultant, Professor Gregory Weber, is no longer available. The Commission plans to replace Professor Weber with another academic consultant to present a private sector perspective on the issues.

Health Care Decisionmaking

The Commission has begun consideration of revisions of health care decisionmaking law and should have a tentative recommendation ready for comment during 1998. This study considers changes in the law that have occurred throughout the country since California enacted its pioneering durable power of attorney for health care statute in 1983. The Commission is reviewing the California Natural Death Act and the Uniform Health-Care Decisions Act (1993). The Commission has retained as an expert consultant Professor David English (University of Santa Clara Law School), reporter for the Uniform Act. Consideration of durable power of attorney for health care issues was reserved for study when the Commission reviewed the power of attorney statutes culminating in enactment of the comprehensive Power of Attorney Law in 1994.

Environmental Law Consolidation

The Legislature has directed the Commission to study whether the laws within various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes.⁵ The Commission during 1997 requested public comment on a suggested outline of a California Environmental Code. The outline was developed for the Commission by its consultants, Professors John Dwyer (University of California, Berkeley, Law School) and Brian Gray (Hastings College of Law).

5. 1996 Cal. Stat. res. ch. 38 (SCR 43).

Uniform Unincorporated Nonprofit Association Act

The Commission has retained Professor Michael Hone (University of San Francisco Law School) as a consultant to prepare an analysis of the Uniform Unincorporated Nonprofit Association Act (1992). The Commission plans to begin consideration of this matter when Professor Hone's analysis is received. The Commission hopes to make substantial progress on this topic during 1998.

Selected Issues in Eminent Domain and Inverse Condemnation

The Eminent Domain Law was enacted on recommendation of the Commission in 1975. The Commission plans during 1988, with the assistance of Professor Gideon Kanner (a Commission consultant on the original project), to commence review of selected issues in eminent domain law, including date of valuation, assessment of general and special benefits and severance damages, and condemnation by public utilities. The Commission also plans to study procedural prerequisites for an inverse condemnation action, particularly exhaustion of administrative remedies and ripeness requirements, and relevant limitations periods.

Other Subjects

The major studies in progress described above will dominate the Commission's time and resources during 1998. If time permits, the Commission will work other subjects into its agenda. These subjects include local agency hearing procedures, termination of beneficiary designations on dissolution of marriage, time for responding to a discovery request for production of documents, mechanical and other problems in the homestead exemption, revision of the law governing tolling the statute of limitations when the defendant is out of state, and other matters.

Calendar of Topics for Study

The Commission's calendar of topics is set out in Appendix 2 in this Annual Report. The Legislature has authorized each of these topics for Commission study.⁶ Because of the number and scope of

6. Section 8293 of the Government Code provides that the Commission shall study, in addition to those topics that it recommends and are approved by

the topics already on its calendar, the Commission does not recommend the addition of any topics to the calendar in 1998.

Function and Procedure of Commission

The principal duties of the Commission⁷ are to:

- (1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.
- (2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,⁸ bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.
- (3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.⁹

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. As a general rule, the Commission may study only topics that the Legislature, by concurrent resolution, autho-

the Legislature, any topics the Legislature by concurrent resolution refers to it for study. For the current authorization, see 1997 Cal. Stat. res. ch. 102 (SCR 3). In addition, Code of Civil Procedure Section 703.120 requires the Commission to review statutes providing for exemptions from enforcement of money judgments every 10 years and to recommend any needed revisions. The next report will be due in 2003.

7. Gov't Code §§ 8280-8298 (statute governing California Law Revision Commission). See Appendix 1 *infra*.

8. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 8261. The Commission's Executive Secretary serves as an Associate Member of the National Conference of Commissioners on Uniform State Laws.

9. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

rizes for study.¹⁰ However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution.¹¹

Background Studies

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant. Law professors and practicing attorneys who serve as consultants have already acquired the considerable knowledge necessary to understand the specific problems under consideration and receive little more than an honorarium for their services. From time to time, expert consultants are also retained to advise the Commission at meetings.

Recommendations

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Availability of the tentative recommendation is publicized in legal newspapers and other relevant publications. Notice is also posted on the Commission's website and emailed to interested persons.

Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation¹² to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and electronically on the

10. Gov't Code § 8293.

11. Gov't Code § 8298.

12. Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noticed in the Minutes of the meeting where the recommendation is approved.

Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.¹³

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends. These Comments are included in the Commission's recommendations and may be revised by the Commission in later reports to reflect amendments made in the legislative process.¹⁴ The reports provide background with respect to the Commission intent in proposing the enactment, such intent being reflected in the Comments to the various sections of the bill contained in the Commission's recommendation, except to the extent that new or revised Comments are set out in the report on the bill as amended.¹⁵

13. For recent background studies published in law reviews, see Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995); Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992); Kasner, *Donative and Interspousal Transfers of Community Property in California: Where We Are (or Should Be) After MacDonald*, 23 Pac. L.J. 361 (1991). A revised version of Prof. Fellmeth's background study on unfair competition litigation was published as Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 Cal. Reg. L. Rep. 1 (Winter 1995).

For a list of background studies published in law reviews before 1991, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990).

14. Many amendments are made on Commission recommendation to address matters brought to the Commission's attention after publication of its recommendation. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

15. For an example of such a report, see Appendix 5 *infra*. Reports containing new or revised comments are printed in the next annual report following enactment of a recommendation, and may be found by reference to the "Cumulative Table of Sections Affected by Commission Recommendations" included in each bound volume of Commission reports. For a description of legislative committee

Comments are provided to legislative committee members and staff before a bill is heard and are provided to the Governor's office once a bill is passed.

A Comment indicates the derivation of a section and often explains its purpose, its relation to other sections, and potential issues concerning its meaning or application. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions.¹⁶ However, while the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every inconsistent case is noted in the Comments, nor can it anticipate judicial conclusions as to the significance of existing case authorities.¹⁷ Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.¹⁸

reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). On rare occasions, the Commission will approve revised Comments to make important editorial changes or correct obvious errors in past Comments, or where comments have become inaccurate due to changes in cross-referenced provisions or other revisions. See, e.g., "Report of the California Law Revision Commission on Corrected Probate Code Comments," Appendix 8 to the *Annual Report for 1991*, 21 Cal. L. Revision Comm'n Reports 1, 75 (1991).

16. E.g., *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968); see also *Milligan v. City of Laguna Beach*, 34 Cal. 3d 829, 831, 670 P.2d 1121, 1122, 196 Cal. Rptr. 38, 39 (1983); *Juran v. Epstein*, 23 Cal. App. 4th 882, 893-94, 28 Cal. Rptr. 2d 588, 594 (1994). The Commission concurs with the opinion of the court in *Juran* that staff memorandums to the Commission should not be considered as legislative history. *Id.* at 894 n.5, 28 Cal. Rptr. 2d at 594 n.5.

Commission Comments are published by Bancroft-Whitney Company and West Publishing Company in their print and CD-ROM editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and Lexis.

17. See, e.g., *Arellano v. Moreno*, 33 Cal. App. 3d 877, 109 Cal. Rptr. 421 (1973).

18. The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by

Publications

Commission materials and publications are distributed to the Governor, legislative leadership, and, on request, to heads of state departments, and to lawyers, law professors, courts, district attorneys, and law libraries throughout the state.¹⁹ Thus, a large and representative number of interested persons is given an opportunity to study and comment on the Commission's work before it is considered for enactment by the Legislature.²⁰

The reports, recommendations, and studies of the Commission are republished in hardcover volumes that serve as a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state. These volumes are available at many county law libraries and at some other libraries. Half of the hardcover volumes are out of print, but others are available for purchase.²¹

Electronic Publication and Internet Access

Since June 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.²² Interested persons with Internet access can find current agendas, meeting minutes, background studies, tentative and final recommendations, staff memorandums, and general background information.

the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). See also 1974 Cal. Stat. ch. 227.

19. See Gov't Code § 8291. For availability see "Commission Publications" at pp. 177-78 *infra*.

20. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouilly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes*, 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

21. See "Commission Publications" at pp. ____-____ *infra*.

22. The URL for the Commission's Website is <http://www.clrc.ca.gov/>.

Electronic Mail

Email commenting on Commission proposals or suggesting issues for consideration is given the same consideration as letter correspondence, if the email message includes the name and regular mailing address of the sender. Email to the Commission may be sent to *commission@clrc.ca.gov* or to *staff@clrc.ca.gov*. Email to an individual should be sent to *name@clrc.ca.gov* — substituting the addressee's first initial and surname for "name."

The Commission distributes over a third of its tentative and final meeting agendas through email and also gives notice of the availability of tentative recommendations and printed reports by email.

Personnel of Commission

The following persons are members of the Law Revision Commission:

Members Appointed by Governor ²⁴	<i>Term Expires</i>
Christine W.S. Byrd, Los Angeles <i>Chairperson</i>	October 1, 1997
Edwin K. Marzec, Santa Monica <i>Vice Chairperson</i>	October 1, 1999
Robert E. Cooper, Los Angeles	October 1, 1999
Allan L. Fink, San Francisco	October 1, 1997
Arthur K. Marshall, Los Angeles	October 1, 1999
Sanford M. Skaggs, Walnut Creek	October 1, 1997
Colin W. Wied, San Diego	October 1, 1999

Legislative Members ²⁵

Senator Quentin L. Kopp, San Francisco
Assemblyman Dick Ackerman, Fullerton

Legislative Counsel ²⁶

Bion M. Gregory, Sacramento

Effective September 1, 1997, the Commission elected Christine W.S. Byrd as Chairperson (succeeding Allan L. Fink), and Edwin K. Marzec as Vice Chairperson (succeeding Christine W.S. Byrd). The terms of the new officers end August 31, 1998.

24. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov't Code § 8281. These Commissioners serve staggered four-year terms. *Id.* The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

25. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.

26. The Legislative Counsel serves on the Commission by virtue of office. Gov't Code § 8281.

The following persons are on the Commission's staff:

Legal

Nathaniel Sterling <i>Executive Secretary</i>	Stan Ulrich <i>Assistant Executive Secretary</i>	
Barbara S. Gaal <i>Staff Counsel</i>	Brian P. Hebert <i>Staff Counsel</i>	Robert J. Murphy <i>Staff Counsel</i>

Administrative-Secretarial

Lauren M. Trevathan <i>Administrative Assistant</i>	Victoria V. Matias <i>Secretary</i>
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During the spring 1997 law school term, Elizabeth Eberle and Deborah J. Muns, students at Stanford Law School, continued working as student legal assistants under the work-study program. Tom Halpern, a student at Stanford Law School, worked as a volunteer student legal assistant during part of the summer. During the spring 1997 law school term, Tina Chen and Chad Tang assisted the Commission as part of the Public Service Program of the University of Pennsylvania Law School.

Commission Budget

The Commission's operations are funded from the state general fund. The amount appropriated to the Commission for the 1997-98 fiscal year is \$597,000. This amount represents an increase over the previous year's funding, designed to accommodate the increased workload of major priority studies assigned to the Commission by the Legislature.

The Commission receives substantial donations of necessary library materials from the legal publishing community, especially Bancroft-Whitney Company, California Continuing Education of the Bar, and West Publishing Company. The Commission receives additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the Stanford University Law Library. The Commission is grateful for their contributions.

Other Activities

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.²⁶

Commissioner Activities

[to be supplied]

National Conference of Commissioners on Uniform State Laws²⁷

The Commission's Executive Secretary participated in the National Conference of Commissioners on Uniform State Laws, in Sacramento, July 25-31, 1997. Matters considered at the conference included uniform acts on principal and income, guardianship and protective proceedings, and Uniform Commercial Code Articles 1, 2, 2B, and 9.

The Executive Secretary also served on the drafting committee for a new Uniform Trust Act. The uniform act will be based on the California Trust Law, a national model enacted on recommendation of the Commission.²⁸

California Continuing Education of the Bar

The Commission's Executive Secretary prepared the introductory chapter for the new edition of the book published by the California Continuing Education of the Bar, *California Administrative Hearing Practice* (2d ed. 1997). The new edition reflects enact-

26. Gov't Code § 8296.

27. The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws. Gov't Code § 8289. The Commission's executive secretary is an associate member of the National Conference.

28. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986); enacted 1986 Cal. Stat. ch. 820. See also 18 Cal. L. Revision Comm'n Reports 1207 (1986) (Trust Law as enacted, with revised Comments).

ment of the Commission's recommendation on administrative adjudication by state agencies.²⁹

Bar Associations

The Commission's Executive Secretary met with the Executive Committee of the State Bar Environmental Law Section in June 1997 to provide information on the Commission's study of consolidation of the state environmental laws.

The Commission's Assistant Executive Secretary and Professor David English, a Commission consultant, met with a working group from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section in August 1997 in connection with the Commission's study of health care decisionmaking.

Consultant Activities

[to be supplied]

29. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995), enacted as 1995 Cal. Stat. ch. 938 (SB 523). See also *Annual Report for 1995*, Appendix 7, 25 Cal. L. Revision Comm'n Reports 615, 711 (1995).

Legislative History of Recommendations Submitted to 1997 Legislative Session

The Commission's recommendations were included in ten bills and a concurrent resolution recommended for enactment at the 1997 legislative session. Four of these bills were enacted and the concurrent resolution was adopted. Five bills are two-year bills and will be considered in the 1998 legislative session.³⁰ One bill was not enacted.

Administrative Adjudication by Quasi-Public Entities

Senate Bill 68 (1997 Cal. Stat. ch. 220) was introduced by Senator Quentin L. Kopp to effectuate a Commission recommendation. See *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996). The bill was enacted after a number of amendments were made. See *Report of the California Law Revision Commission on Chapter 220 of the Statutes of 1997 (Senate Bill 68)*, 27 Cal. L. Revision Comm'n Reports ____ (1997) (Appendix 4 *infra*).

Attachment by Undersecured Creditors

Assembly Bill 1258 (1997 Cal. Stat. ch. 222) was introduced by Assembly Member Dick Ackerman to effectuate a Commission recommendation. See *Attachment by Undersecured Creditors*, 26 Cal. L. Revision Comm'n Reports 277 (1996). The recommendation was enacted without change. (Note that the bill also contained a provision (Code Civ. Proc. § 483.012) sponsored by the Business Law Section of the California State Bar that was not part of the Commission's recommendation.)

Mediation Confidentiality

Assembly Bill 939 (1997 Cal. Stat. ch. ____) was introduced by Assembly Member Deborah Ortiz, and coauthored by Assembly Member Dick Ackerman, to effectuate a Commission recommendation. See *Mediation Confidentiality*, 26 Cal. L. Revision

30. The two-year bills are: SB 177 (Kopp) (best evidence rule); SB 209 & SB 261 (Kopp) (judicial review of agency action); SB 453 (Solis) (administrative law judge code of ethics) (originally SB 653 (Calderon)); AB 707 (Ackerman) (real property covenants).

Comm'n Reports 407 (1996). The bill was enacted after a number of amendments were made. See *Report of the California Law Revision Commission on Chapter ____ of the Statutes of 1997 (Assembly Bill 939)*, 27 Cal. L. Revision Comm'n Reports ____ (1997) (Appendix 5 *infra*).

Civil Procedure

Senate Bill 73 (1997 Cal. Stat. ch. ____) was introduced by Senator Quentin L. Kopp, and included two technical amendments recommended by the Commission. See *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83, 98-102 (1996). The recommended amendments were enacted without change. See *Report of the California Law Revision Commission on Chapter ____ of the Statutes of 1997 (Senate Bill 73)*, 27 Cal. L. Revision Comm'n Reports ____ (1997) (Appendix 6 *infra*).

Unfair Competition Litigation

Senate Bill 143 was introduced by Senator Quentin L. Kopp to effectuate a Commission recommendation. See *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996). The bill failed passage in the Senate Judiciary Committee.

Resolution Authorizing Topics for Study

Senate Concurrent Resolution 3 (1997 Cal. Stat. res. ch. 102) was introduced by Senator Quentin L. Kopp. It continues the Commission's authority to study 21 topics previously authorized.

Report on Public Utility Deregulation

In 1996, the Legislature directed the Law Revision Commission to work with the Public Utilities Commission:³¹

On or before June 30, 1997, the Public Utilities Commission in consultation with the Law Revision Commission shall submit a report to the Legislature on needed revisions of the Public Utilities Code that result from the restructuring of the electrical, gas, transportation, and telecommunications industries.

31. 1996 Cal. Stat. ch. 856, § 12.

Pursuant to this directive the Law Revision Commission submitted its report to the Legislature in June 1997. See *Public Utility Deregulation*, 27 Cal. L. Revision Comm'n Reports 439 (1997).³²

Report on Statutes Repealed by Implication or Held Unconstitutional

Section 8290 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared³³ and has the following to report:

- No decision holding a state statute repealed by implication has been found.
- No decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- Two decisions of the California Supreme Court holding a state statute unconstitutional have been found.

In *American Academy of Pediatrics v. Lungren*,³⁴ the court found that the provisions of Assembly Bill 2274 of the 1987-1988 Regular Session,³⁵ requiring the consent of a parent or guardian or

32. The report to the Legislature was delivered on June 12, 1997. The final published report will contain some additional commentary from the Public Utilities Commission.

33. This study has been carried through 16 Cal. 4th 829 and 117 S. Ct. (1996-1997 Term).

34. 16 Cal. 4th 307, 940 P.2d 797, 66 Cal. Rptr. 2d 210 (1997).

35. See 1987 Stat. ch. 1237. This chapter amended Section 34.5 of the Civil Code (repealed and reenacted without substantive change as Fam. Code § 6925; see 1992 Cal. Stat. ch. 162, § 10, 1993 Cal. Stat. ch. 219, § 2); added Section 25958 to the Health and Safety Code (repealed and reenacted without substantive change as Health & Safety Code § 123450; see 1995 Cal. Stat. ch. 415, §§ 8, 161); attempted to amend Section 317 of the Welfare and Institutions Code (amendment failed to become operative due to the repeal and addition of Section 317 by 1987 Cal. Stat. ch. 1485, §§ 20, 21); and attempted to repeal Section 318

an order of the juvenile court before a minor may receive an abortion, violate the right of privacy guaranteed by the California Constitution.³⁶

In *Professional Engineers in California Government v. Department of Transportation*,³⁷ the court concluded that provisions of Chapter 433 of the Statutes of 1993,³⁸ purporting to authorize Caltrans to contract privately for engineering and inspection work, are invalid to the extent that they conflict with the California Constitution's prohibition against private contracting by state agencies for work that state employees can perform adequately and competently.³⁹

Recommendations

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized.⁴⁰

317 by 1987 Cal. Stat. ch. 1485, §§ 20, 21); and attempted to repeal Section 318 of the Welfare and Institutions Code (repeal failed to become operative due to the repeal and addition of Section 318 by 1987 Cal. Stat. ch. 1485, §§ 22, 23).

36. Cal. Const. art. I, § 1.

37. 15 Cal. 4th 543, 936 P.2d 473, 63 Cal. Rptr. 2d 467 (1997).

38. See 1993 Cal. Stat. ch. 433. This chapter affects Sections 14130, 14130.1, 14130.2, 14130.3, 14132, 14136, 14137, 14524 of the Government Code and Section 2053 of the Public Contract Code.

39. This "civil service mandate" is implied from Cal. Const. art. VII, § 1. See *Professional Engineers in California Government*, 15 Cal. 4th at 548-50, 936 P.2d at 475-77, 63 Cal. Rptr. 2d at 469-71.

40. See "Calendar of Topics Authorized for Study," Appendix 2 *infra*.

APPENDIX 4

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER 220 OF THE STATUTES OF 1997 (SENATE BILL 68)

Administrative Adjudication by Quasi-Public Entities

Chapter 220 of the Statutes of 1997 was introduced as Senate Bill 68 by Senator Quentin L. Kopp to implement the Commission's recommendation on *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996). The Comments set out below supersede and supplement the original recommendation and reflect amendments to the bill made during the legislative process.

Gov't Code 11410.60 (added). Application to quasi-public entities

Comment. Section 11410.60 applies this chapter to adjudicative decisions of quasi-public entities for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. A typical decision of this type might involve resolution of a membership assessment protest or a hearing on a claim that has been denied (provided the statute or Constitution requires a hearing for a decision of that type). *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person). This chapter does not apply to legislative actions such as an election or negotiation and adoption of a health and welfare benefits plan, pension trust, or collective bargaining agreement by an industry or labor organization.

This section does not apply to an entity unless the entity was expressly created by statute for the purpose of administering a state function. Thus this chapter governs hearings required to be held by a statutory entity such as the Winegrowers of California Commission (Food & Agric. Code § 74061) or the Escrow Agents' Fidelity Corporation (Fin. Code § 17311). But the statute does not govern hearings of a private entity such as a licensed health care provider (Health & Safety Code § 1200 *et seq.*), a labor organization, or a board of trustees established pursuant to statute

under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation (Ins. Code § 1280.7).

This section does not apply to the State Bar, including proceedings of the State Bar Court. See Bus. & Prof. Code § 6001.

The intent of this section is to provide fair hearing rules where a statute or the Constitution requires a hearing. This section is not intended to create any new hearing requirements. Thus, for example, this section does not apply to a decision of the Travel Consumer Restitution Corporation where the statute requires that the claim be decided on the written record, "with no hearing to be held." Bus. & Prof. Code § 17550.47.

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. *Cf.* Section 11410.40 (election to apply administrative adjudication provisions).

Unemp. Ins. Code § 1953.5 (added). Telephonic hearings of unemployment insurance appeals board

Comment. Good cause, within the meaning of Section 1953.5, may include circumstances where a party resides out of state or at a location distant from the hearing site and it is not practical for the party to appear in person, particularly where the amount in controversy is relatively small. However, the presiding officer may require the parties to appear in person if warranted by the circumstances of the case.

APPENDIX 5

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER ____ OF THE STATUTES OF 1997 (ASSEMBLY BILL 939)

Mediation Confidentiality

Chapter ____ of the Statutes of 1997 was introduced as Assembly Bill 939 by Assembly Member Deborah Ortiz to implement the Commission's recommendation on *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996). For ease of reference, the complete text of Chapter ____ and the Official Comments of the Commission, are set out below. These Comments supersede the Comments in the Commission's printed recommendation. The new mediation chapter in the Evidence Code is set out first, followed by conforming revisions and Comments to repealed sections.

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NEW MEDIATION CHAPTER

Evid. Code §§1115-1128 (added). Mediation

SEC. 3. Chapter 2 (commencing with Section 1115) is added to Division 9 of the Evidence Code, to read:

CHAPTER 2. MEDIATION

§ 1115. Definitions

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a “mediation” for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a “mediator” for purposes of this chapter.

A “mediator” may be an individual, group of individuals, or entity. See Section 175 (“person” defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person’s role, not the person’s title. A person may be a “mediator” under this chapter even though the person has a different title, such as “ombudsperson.” Any person who meets the definition of “mediator” must comply with Section 1121 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

§ 1116. Effect of chapter

1116. (a) Nothing in this chapter expands or limits a court’s authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the

enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Comment. Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

Subdivision (b) continues the first sentence of former Section 1152.5(c) without substantive change.

§ 1117. Scope of chapter

1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

Comment. Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(1) continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

§ 1118. Recorded oral agreement

1118. An oral agreement “in accordance with Section 1118” means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment. Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”)

§ 1119. Mediation confidentiality

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Comment. Subdivision (a) of Section 1120 continues former Section 1152.5(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

§ 1121. Mediator reports and communications

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law

and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Comment. Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

§ 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those

materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

§ 1123. Written settlement agreements reached through mediation

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The

litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as part of a writing, to subsequent admissibility of the agreement”).

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) (“mediation” defined).

§ 1124. Oral agreements reached through mediation

1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to

show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of *Regents of University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

See Section 1115(a) ("mediation" defined).

§ 1125. When mediation ends

1125. (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn

from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

§ 1126. Effect of end of mediation

1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Comment. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) ("mediation" defined).

§ 1127. Attorney's fees

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or an administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the

mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) (“mediator” defined).

§ 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Comment. Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary’s refusal to disclose mediation communications.

See Section 1115 (“mediation” defined).

CONFORMING REVISIONS AND REPEALS

Bus. & Prof. Code § 467.5 (amended). Communications during funded proceedings

SECTION 1. Section 467.5 of the Business and Professions Code is amended to read:

467.5. Notwithstanding the express application of ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code to mediations, all proceedings conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code.

Comment. Section 467.5 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

Code Civ. Proc. § 1775.10 (amended). Evidence Code provisions applicable to statements made in mediation

SEC. 2. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation shall be subject to Sections 703.5 and 1152 and 1152.5, and Chapter 2 (commencing with Section 1115) of Division 9, of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

Heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code (amended)

SEC. 4. The heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code is amended and renumbered to read:

CHAPTER 2 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Comment. The chapter heading is renumbered to reflect the addition of a new Chapter 2 (commencing with Section 1115) (Mediation).

Evid. Code § 1152.5 (repealed). Mediation confidentiality

SEC. 5. Section 1152.5 of the Evidence Code is repealed.

~~1152.5. (a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct and participate in a~~

~~mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:~~

~~(1) Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of a consultation for mediation services or in the course of the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.~~

~~(2) Except as otherwise provided in this section, unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.~~

~~(3) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the course of a consultation for mediation services or in the mediation shall remain confidential.~~

~~(4) All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all parties who conduct or otherwise participate in a mediation so consent.~~

~~(5) A written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute.~~

~~(6) Evidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or~~

~~protected from disclosure solely by reason of its introduction or use in a mediation.~~

~~(b) This section does not apply where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code.~~

~~(c) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.~~

~~(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of a consultation for mediation services or in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.~~

~~(e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not to take a default in a pending civil action.~~

Comment. The introductory clause of Section 1152.5(a) is not continued. See Section 1119 (mediation confidentiality).

Except as noted in the Comment to Section 1119, former Section 1152.5(a)(1)-(3) are continued without substantive change in Section 1119 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1122 (disclosure by agreement). See also Sections 1123 (written settlement agreements reached through mediation), 1124 (oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without substantive change in Section 1123 (written settlement agreements reached through mediation). Former Section 1152.5(a)(6) is continued without substantive change in Section 1120 (types of evidence not covered).

Former Section 1152.5(b) is continued without substantive change in Section 1117 (scope of chapter).

The first sentence of former Section 1152.5(c) is continued without substantive change in Section 1116 (effect of chapter). The second sentence of former Section 1152.5(c) is superseded. See Lab. Code § 65.

Except as noted in the Comment to Section 1127, former Section 1152.5(d) is continued without substantive change in Section 1127 (attorney's fees).

Former Section 1152.5(e) is continued without substantive change in Section 1120 (types of evidence not covered).

Evid. Code § 1152.6 (repealed). Mediator declarations or findings

SEC. 6. Section 1152.6 of the Evidence Code is repealed.

~~1152.6. A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.~~

Comment. Former Section 1152.6 is continued and broadened in Section 1121 (mediator reports and communications). See Section 1121 Comment.

Gov't Code § 66032 (amended). Procedures applicable to land use mediations

SEC. 7. Section 66032 of the Government Code is amended to read:

66032. (a) Notwithstanding any provision of law to the contrary, all time limits with respect to an action shall be tolled while the mediator conducts the mediation, pursuant to this chapter.

(b) Mediations conducted by a mediator pursuant to this chapter that involve less than a quorum of a legislative body or a state body shall not be considered meetings of a legislative body pursuant to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), nor shall they be considered meetings of a state body pursuant to the Bagley-Keene Open Meeting

Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2).

(c) Any action taken regarding mediation conducted pursuant to this chapter shall be taken in accordance with the provisions of current law.

(d) Ninety days after the commencement of the mediation, and every 90 days thereafter, the action shall be reactivated unless the parties to the action do either of the following:

(1) Arrive at a settlement and implement it in accordance with the provisions of current law.

(2) Agree by written stipulation to extend the mediation for another 90-day period.

~~(e) A mediator shall not file, and a court shall not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise, in writing.~~

~~(f) Sections 703.5 and 1152.5 of the Evidence Code shall~~

(e) Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to any mediation conducted pursuant to this chapter.

Comment. Section 66032 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

Former subdivision (e) is deleted as surplus. See new subdivision (e); Evid. Code § 1121 (mediator reports and communications).

Gov't Code § 66033 (amended). Land use mediator's report

SEC. 8. Section 66033 of the Government Code is amended to read:

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with ~~Section 1152.5 Chapter 2 (commencing with Section~~

1115) of Division 9 of the Evidence Code, containing each of the following:

- (1) The title of the action.
- (2) The names of the parties to the action.
- (3) An estimate of the costs avoided, if any, because the parties used mediation instead of litigation to resolve their dispute.

(b) The sole purpose of the report required by this section is the collection of information needed by the office to prepare its report to the Legislature pursuant to Section 66036.

Comment. Section 66033 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

Ins. Code § 10089.80 (amended). Disclosures and communications in earthquake insurance mediations

SEC. 9. Section 10089.80 of the Insurance Code is amended to read:

10089.80. (a) The representatives of the insurer shall know the facts of the case and be familiar with the allegations of the complainant. The insurer or the insurer's representative shall produce at the settlement conference a copy of the policy and all documents from the claims file relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The insured shall produce, to the extent available, all documents relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The mediator may also order production of other documents that the mediator determines to be relevant to the issues under mediation. If a party declines to comply with that order, the mediator may appeal to the commissioner for a determination of whether the documents requested should be produced. The commissioner shall make a determination within 21 days. However, the party ordered to produce the documents shall

not be required to produce while the issue is before the commissioner in this 21-day period. If the ruling is in favor of production, any insurer that is subject to an order to participate in mediation issued under subdivision (a) of Section 10089.75 shall comply with the order to produce. Insureds, and those insurers that are not subject to an order to participate in mediation, shall produce the documents or decline to participate further in the mediation after a ruling by the commissioner requiring the production of those other documents. Declination of mediation by the insurer under this section may be considered by the commissioner in exercising authority under subdivision (a) of Section 10089.75.

The mediator shall have the authority to protect from disclosure information that the mediator determines to be privileged, including, but not limited to, information protected by the attorney-client or work-product privileges, or to be otherwise confidential.

(b) The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer's counsel may be present. If the insured is not represented by counsel at the mediation conference, then no counsel may be present.

(c) ~~Sections 703.5 and 1152.5~~ *Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9* of the Evidence Code apply to a mediation conducted under this chapter.

(d) ~~A mediator may not file, and a court may not consider, a declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties to the mediation expressly agree otherwise in writing.~~

(e) The statements made by the parties, negotiations between the parties, and documents produced at the mediation are confidential. However, this confidentiality shall not restrict the access of the department to documents or other information the department seeks in order to evaluate the mediation program or to comply with reporting requirements. This subdivision does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

Comment. Section 10089.80 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation). Former subdivision (d) is deleted as surplus. See subdivision (c); Evid. Code § 1121 (mediator reports and communications).

Ins. Code § 10089.82 (amended). Noncompulsory participation in mediation

SEC. 10. Section 10089.82 of the Insurance Code is amended to read:

10089.82. (a) An insured may not be required to use the department's mediation process. An insurer may not be required to use the department's mediation process, except as provided in Section 10089.75.

(b) Neither the insurer nor the insured is required to accept an agreement proposed during the mediation.

(c) If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. *Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure.* If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation

presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

(d) This section does not affect rights under existing law for claims for damage that were undetected at the time of the settlement conference.

(e) All settlements reached as a result of department-referred mediation shall address only those issues raised for the purpose of resolution. Settlements and any accompanying releases are not effective to settle or resolve any claim not addressed by the mediator for the purpose of resolution, nor any claim that the insured may have related to the insurer's conduct in handling the claim.

Referral to mediation or the pendency of a mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in whole or in part out of the same facts. Any applicable statute of limitations is tolled for the number of days beginning from the referral to mediation until the date on which the mediation is either completed or declined, or the date on which the insured fails to appear for a scheduled mediation for the second time, or, in the event that a settlement is completed, the expiration of any applicable three business day cooling off period.

Comment. Subdivision (c) of Section 10089.82 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

Lab. Code § 65 (amended). Powers and duties of department; access to records

SEC. 11. Section 65 of the Labor Code is amended to read:

65. The department may investigate and mediate labor disputes providing any bona fide party to such *this type of* dispute requests intervention by the department and the

department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such the dispute may agree upon. ~~Records~~ *Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.*

Comment. Section 65 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality and make clear that those provisions apply to mediations conducted by the State Mediation and Conciliation Service. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

Welf. & Inst. Code § 350 (amended). Conduct of proceedings

SEC. 12. Section 350 of the Welfare and Institutions Code is amended to read:

350. (a) (1) The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons

interested in his or her welfare with any provisions that the court may make for the disposition and care of the minor.

(2) Each juvenile court is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary. Notwithstanding any other provision of law, no person, except the mediator, who is required to report suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code), shall be exempted from those requirements under ~~Section 1152.5~~ *Chapter 2 (commencing with Section 1115) of Division 9* of the Evidence Code because he or she agreed to participate in a dependency mediation program established in the juvenile court.

If a dependency mediation program has been established in a juvenile court, and if mediation is requested by any person who the judge or referee deems to have a direct and legitimate interest in the particular case, or on the court's own motion, the matter may be set for confidential mediation to develop a plan in the best interests of the child, utilizing resources within the family first and within the community if required.

(b) The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents, if the minor's parent or parents are represented by counsel, the counsel is present and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The minor is likely to be intimidated by a formal courtroom setting.

(3) The minor is afraid to testify in front of his or her parent or parents.

After testimony in chambers, the parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

The testimony of a minor also may be taken in chambers and outside the presence of the guardian or guardians of a minor under the circumstances specified in this subdivision.

(c) At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met.

That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing, the return of the minor at an out-of-home review held prior to the permanency planning hearing, or the termination of jurisdiction at an in-home review. If the motion is not granted, the parent or guardian may offer evidence without first having reserved that right.

Comment. Subdivision (a)(2) of Section 350 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

APPENDIX 6

REPORT OF THE
CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER ____ OF THE STATUTES OF 1997
(SENATE BILL 73)

Trial Court Delay Reduction Deadlines

Chapter ____ of the Statutes of 1997 was introduced as Senate Bill 73 by Senator Quentin L. Kopp. The legislation includes a provision recommended by the Commission. See *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83, 98-102 (1996). The Comments set out below supersede the Comments to Government Code Section 68616 in the original recommendation.

Gov't Code § 68616 (operative until Jan. 1, 1999) (amended). Delay reduction deadlines and procedures

Comment. Subdivision (a) of Section 68616 is amended to ensure that the delay reduction deadline for service of process is extended when a plaintiff is unable to achieve service within the prescribed period despite diligent efforts to do so.

Gov't Code § 68616 (operative Jan. 1, 1999) (amended). Delay reduction deadlines and procedures

Comment. Subdivision (a) of Section 68616 is amended to ensure that the delay reduction deadline for service of process is extended when a plaintiff is unable to achieve service within the prescribed period despite diligent efforts to do so.
